TAN AH CHAI

v.

LOKE JEE YAH

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL J
[CIVIL APPEAL NO: 11-27-97]
24 JULY 1998
[1998] CLJ JT(10)

CIVIL PROCEDURE: *Small claims procedure - Claim not exceeding RM5,000 - Whether claim properly prosecuted in Magistrate's Court - Subordinate Court Rules 1980, O. 54 - Whether mandatory - Order 4 r. 6 - Whether there is conflict - Whether reconcilable - Whether breach of O. 54 curable under O. 2 - Rules of procedure, whether mandatory or directory*

STATUTORY INTERPRETATION: *Construction of statutes - Conflicting provisions - Whether later provision prevails over earlier provision - Whether specific provision prevails over general provision - Whether specific provision must be read as a proviso to general provision - Subordinate Courts Rules 1980, O. 54, O. 4 r. 6 - Rules of procedure, whether mandatory or directory*

CIVIL PROCEDURE: *Rules of procedure - Non-compliance - Irregularity - Whether curable - Whether breach fundamental and serious - Failure to observe O. 54 of Subordinate Courts Rules 1980 - Scope of O. 2 - Exercise of court's discretion*

CIVIL PROCEDURE: *Practice directions - Whether have force of law - Whether can override express provisions of law*

The plaintiff/respondent filed a summons in the Magistrate's Court at Melaka claiming the sum of RM3,595 from the defendant/appellant. Both parties were legally represented at the trial of the action before the magistrate. The plaintiff's claim was allowed with costs in the sum of RM540 and the defendant appealed. At the hearing before the instant court, the parties were asked by the learned judge whether the claim, being one for less than RM5,000, was properly prosecuted in the Magistrate's Court, bearing in mind O. 54 of the Subordinate Courts Rules 1980 ('the SCR') which prescribes a special procedure to be followed in the case of claims not exceeding RM5,000.

The issues for consideration were: (i) whether the small claims procedure prescribed in O. 54 of the SCR is mandatory when the subject matter of the claim does not exceed RM5,000; (ii) whether there is a conflict between O. 4 r. 6 (which permits a person to begin and carry on proceedings in a

court by a solicitor) and O. 54 r. 7 of the SCR (which prohibits representation by a solicitor in the use of the small claims procedure), and if there is, how such a conflict can be resolved; and (iii) whether an irregularity based on O. 54 can be cured under O. 2 of the SCR.

Held:

[1] Order 54 of the SCR is couched in mandatory terms by the use of the word "shall." The word "shall" is *prima facie* to be construed as giving a mandatory effect. An enactment regulating procedure is usually imperative and not merely directory.

[2] There is a contradiction between O. 54 r. 7 and O. 4 r. 6 of the SCR. However, O. 54 r. 7 is a later provision and specific in nature whilst O. 4 r. 6 of the SCR is earlier and general. When there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply. Therefore, O. 54 r. 7 must be read as a proviso to O. 4 r. 6 of the SCR. Such a construction will enable both the provisions to operate harmoniously.

[3] Order 2 of the SCR must not be given an unlimited effect. A procedural irregularity which is fundamental and serious is not curable. In the present case, there was a failure to adhere to the specific and mandatory provisions of O. 54 of the SCR; this was a fundamental breach and hence was not curable.

[4] A practice note has no force of law and cannot override express provisions of law.

Obiter dicta:

[1] The object of the small claims procedure is to serve as an inexpensive, simplified and speedy mode of prosecuting a claim which is small, without legal representation. There is a purpose in denying legal representation in such cases. Although this procedure will serve the needs of a litigant of insufficient means, it is not solely targeted at achieving that result. Its underlying purpose is to ensure that there is a balance between a claim made and the expense incurred in pursuing that claim.

[Trial before Magistrate's Court a nullity; rehearing ordered.]

Cases referred to:

Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 ***(refd)***

Bernstein & Anor v. Jackson & Ors [1982] 2 All ER 806 ***(refd)***

Goodwill v. Phillips [1908] 7 CLR 1 ***(refd)***

Grunwick Processing Laboratories Ltd v. Advisory, Conciliation and Arbitration Service [1978] AC 655 ***(cit)***

Harkness v. Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 ***(refd)***

Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd [1991] 2 CLJ 1634 ***(refd)***

Leal v. Dunlop Bio-Processes [1984] 1 WLR 874 ***(refd)***

Metroinvest Anstalt v. Commercial Union [1985] 2 All ER 318 ***(cit)***

Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 ***(cit)***

PP v. Oie Hee Koi [1968] 1 MLJ 148 ***(cit)***

Secretary of State for Defence v. Warn [1970] AC 394 ***(refd)***

The Golden Mariner [1990] 2 Lloyd's Rep 215 ***(cit)***

The South-Eastern Drainage Board (South Australia) v. The Savings Bank of South Australia [1939] 62 CLR 603 ***(cit)***

Yap Choo Hoo v. Tahir Yasin [1970] 2 MLJ 138 ***(cit)***

Legislation referred to:

Subordinate Court Rules 1980, O. 2 r. 3, O. 4 r. 6(1), O. 54 rr. 1(1), 2, 3, 4, 5, 6, 7, 13(1), (3), 15

Other sources referred to:

Natural Justice: Principles and Practical Application, Geoffrey A Flick, 2nd edn, p 178

Practice Direction No 5 of 1987

Practice Direction No 4 of 1990

Registrar's Circular No 5 of 1987

Registrar's Circular No 4 of 1991

Statutory Interpretation, Pearce & Geddes, 4th edn, p 278

For the appellant – Kesavan P Krishnan; M/s Kesavan & Assoc

For the respondent – Vanaja; M/s A Rengganathan & Co

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

On 16 May 1996 Messrs. A Rengganathan & Co, advocates and solicitors, filed a summons in the Magistrates' Court at Melaka on behalf of their client Loke Jee Yah ("the plaintiff") claiming a sum of RM3,595 from Tan Ah Chai @ Tan Guan Swee ("the defendant"). On 27 August 1996 Messrs. Kesavan & Associates, advocates and solicitors, filed the defence on behalf of the defendant. The trial of the action before the learned magistrate commenced

on 27 January 1997 and concluded on 14 October 1997 with both parties being legally represented. The plaintiff's claim was allowed with costs of RM540. The defendant appealed against this order. All references to rules of court in this judgment shall be to the Subordinate Courts Rules 1980 unless otherwise expressly stated.

When the appeal came up for hearing before me on 26 June 1998 I asked the parties whether this claim, being one for a claim of less than RM5,000 between parties who are individuals, was properly prosecuted in the Magistrates' Court bearing in mind O. 54 which prescribes a special procedure to be followed in the case of claims not exceeding RM5,000. In cases coming within the ambit of that provision pleadings are replaced with special forms to be filed by the parties and they cannot be represented by solicitors. The procedure was introduced by the Subordinate Courts (Amendment) Rules 1988 (PU(A) 67/88) which came into effect on 1 August 1987 and was amended by the Subordinate Courts (Amendment) (No 3) Rules 1990 (PU(A) 460/90) which came into effect on 1 January 1991. When O. 54 was first introduced the limit was fixed at RM3,000 and confined only to a claim for the recovery of a debt or liquidated demand in money. By an amendment made by the Subordinate Courts (Amendment) Rules 1993 (PU(A)193/93) the limit was not only increased to RM5,000 but the nature of the claim was also widened to include any claim other than a debt, such as damages, so long as the amount does not exceed RM5,000. Small claims cases were originally heard by Second Class Magistrates as reflected by Practice Direction No 5 of 1987 the material parts of which read as follows:

> 6. Second Class Magistrates Courts
>
> 6.1 Civil Cases
>
> (a) With effect from 1 August 1987, all civil actions or suits to recover a debt or liquidated demand in money not exceeding $3,000 shall be filed and heard as a second class magistrates' court case under Order 54 of the Subordinate Courts Rules.
>
> (b) All such cases shall be registered under Magistrates' classification Code 89 including cases now under Codes 81 and 83. The existing serial numbers under Code 89 shall be continued but in a new register.
>
> (c) All civil actions registered in the first class magistrate's court before 1 August 1987 shall remain in that Court and be disposed of thereat, including cases where the amount claimed is less than $3,000. The procedure applicable to such cases at time of filing shall continue to be followed.

Practice Direction No 4 of 1990 provides that all small claims cases shall be heard by a first class magistrate. The object of the small claims procedure is to serve as an inexpensive, simplified and speedy mode of prosecuting a claim which is small without legal representation. There is a purpose in denying legal representation in such cases. It has been said that this is to ensure that the objects of such denial are not reduced in value (see *Natural Justice: Principles and Practical Application* by Geoffrey A Flick 2nd Edn p. 178). Though this procedure would therefore serve the needs of a litigant of insufficient means it is not solely targeted at achieving that result. Its underlying purpose is to ensure that there is a balance between the claim made and the expense incurred in pursuing that claim.

The parties requested for another date to submit on the matter raised. I granted the request and fixed the appeal for further hearing on 22 July 1998. Learned counsel for the plaintiff/respondent contended in her submission that O. 54 is not mandatory. As such, she said, a party has the choice of either proceeding under O. 54 or by way of the normal procedure. She said that the small claims procedure is meant to apply only to litigants who cannot afford the services of a solicitor. She added that O. 54 r. 7 which does not allow a party following the small claims procedure to be represented by an advocate and solicitor except as provided therein conflicts with O. 4 r. 6(1) which reads as follows:

> Subject to para. (2) and to O. 9 r. 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in a court by a solicitor or in person.

She concluded by saying that even if the mode of commencement of the proceeding was wrong it is a defect that is curable pursuant to O. 2. Learned counsel for the defendant/appellant said that O. 54 is mandatory. However, he added, as neither party has been prejudiced the defect is curable.

The first issue that arises for determination is whether the language employed in O. 54 makes it mandatory for the small claims procedure to be followed when the subject matter of a claim does not exceed RM5,000. For this purpose it is necessary to consider O. 54 rr. 1(1) and 2 which read as follows:

> 1(1) This Order shall have effect in proceedings in the Magistrate's Court between an individual plaintiff and a defendant.
>
> (2) This Order shall apply to claims where the amount in dispute or the value of the subject-matter of the claim does not exceed $5,000.00.

It will be observed that the rule is couched in mandatory terms by the use of the word "shall". The use of the word "shall" is *prima facie* to be construed as giving a mandatory effect (see *Grunwick Processing Laboratories Ltd v. Advisory, Conciliation and Arbitration Service* [1978] AC 655). This *prima facie* inference may be rebutted by other considerations such as the object and scope of the enactment and the consequences flowing from such construction. It has been held that enactments regulating the procedure to be followed in Courts are usually imperative and not merely directory (see *PP v. Oie Hee Koi* [1968] 1 MLJ 148). In *Secretary of State for Defence v. Warn* [1970] AC 394 the House of Lords held that a requirement that a prosecution was not to be commenced without the consent of the Director of Public Prosecutions was mandatory. Pearce and Geddes in their book entitled *Statutory Interpretation* 4th Edn say this at p. 278:

> A longstanding view very often stated is that enactments laying down the procedure to be followed in commencing or prosecuting an action in a court are mandatory.

I therefore hold that O. 54 is a mandatory provision.

The next issue that must be resolved is the submission of learned counsel for the respondent on the conflict between O. 4 r. 6 which permits a person to begin and carry on proceedings in a court by a solicitor and O. 54 r. 7 which prohibits representation by a solicitor in the use of the small claims procedure. There is clearly a contradiction between both the provisions. When two apparently inconsistent provisions occur in one Act of Parliament every attempt must be made to reconcile them by interpretation as they cannot both receive their full meaning as expressed (see *The South-Eastern Drainage Board (South Australia) v. The Savings Bank of South Australia* [1939] 62 CLR 603). In attempting to reconcile both the provisions it must be remembered that O. 54 r. 7 is a later provision and specific while O. 4 r. 6 is earlier and general. The manner of resolving conflicts of this nature is stated succinctly by O' Connor J in *Goodwill v. Phillips* [1908] 7 CLR 1 at p. 14:

> When there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.

In the premises it is my view that O. 54 r. 7 must be read as a proviso to O. 4 r. 6. Such a construction will enable both the provisions to operate harmoniously.

I interpolate to refer to Registrar's Circular No 5 of 1987 the material parts of which read as follows:

REGISTRAR'S CIRCULAR NO. 5 OF 1987
Filing of Small Claims in Court of a First Class Magistrate

I am directed by the Hon'ble The Chief Justice of Malaya where the plaintiff who has a claim which comes within the jurisdiction of a Second Class Magistrate but wishes to be represented by a Counsel may file his claim in a First Class Magistrates' Court. The format of the writ should be that of the Court of First Class Magistrate. In any such case the costs to be awarded to the plaintiff, if any, shall not exceed $100/- unless the plaintiff satisfies the Court that a difficult question of law is involved.

In my opinion this circular has been impliedly overruled by Registrar's Circular No. 4 of 1991 which deals with legal representation for a defendant which is a company. It goes on to say that in such cases the defendant must show that it is required by law to be legally represented if it requires such representation. The circular therefore clearly excludes legal representation for such a defendant unless there is a legal requirement for it. In such circumstances it is incomprehensible that a plaintiff who is an individual is to have an unrestricted right to legal representations. In my opinion the effectiveness of Registrar's Circular No 5 of 1987 has been curtailed by Registrar's Circular No 4 of 1991. In any event I am unable to say with confidence that Registrar's Circular No. 5 of 1987 conforms with what has been expressly enunciated in the rules. A practice note has no force of law and cannot override express provisions of law. See, for example, *Yap Choo Hoo v. Tahir bin Yasin* [1970] 2 MLJ 138.

As I have held that O. 54 is mandatory the commencement and subsequent conduct of this case by the parties in the Magistrate's Court is irregular. Both counsel submitted that I should act under O. 2 to cure the irregularity. It has been held that this rule must be construed as being so framed as to give the court the widest possible power in order to do justice (see *Metroinvest Anstalt v. Commercial Union* [1985] 2 All ER 318). It was held in *Harkness v. Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 that an irregularity should be rectified so long as it can be done without injustice. However, the rule must not be given an unlimited effect (see *The Golden Mariner* [1990] 2 Lloyd's Rep 215). In *Leal v. Dunlop Bio-Processes* [1984] 1 WLR 874 Stephenson LJ indicated that the seriousness of the irregularity could be a basis for not exercising the discretion to cure it whether real prejudice was caused or not. In *Bernstein & Anor v. Jackson & Ors* [1982] 2 All ER 806 it was held that where the irregularity sought to be cured amounted to a fundamental defect in the proceedings then the court should not exercise its discretion to rectify it. In adopting this view Thean J said in *Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129 at p. 134:

> Notwithstanding the very wide powers given to court to remedy non-compliance with the Rules of Supreme Court 1970 there may be failure or non-compliance with the rules which is so fundamental or serious that the court ought not to exercise its discretion under r. 1 to remedy it.

In *Asia Commercial Finance(M) Bhd v. Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 James Foong J set aside an order made on the ground that the failure to comply with the statutory requirements in that case was fundamental and serious. The breach in this case is a failure to adhere to specific and mandatory provisions of the Subordinate Courts Rules 1980 in that:

(a) the normal pleadings were used instead of the forms prescribed by O. 54 rr. 3, 4, 5 and 6;

(b) no attempts were made by the court to assist the parties to effect a settlement of the case by consent as required by O. 54 r. 13(1);

(c) the order for costs exceeds the amount fixed by O. 54 r. 15;

(d) the judgment entered is not in accordance with Form 173 as required by O. 54 r. 13(3); and

(e) the parties were legally represented in violation of O. 54 r. 7.

In substance, therefore, this case was conducted in complete ignorance of O. 54. As the breach goes to the root of the procedure prescribed it is fundamental in nature and is therefore not curable. Where a breach is fundamentally defective it can be classified as a nullity (see *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 1 MLJ 374). Accordingly, I rule that the trial in the Magistrates' Court is a nullity and that there should be a re-hearing in accordance with the procedure laid down by O. 54. However, I order that the pleadings filed by the parties be treated as the forms required to be filed by O. 54. In making this order I have in mind O. 2 r. 3 which reads as follows:

> The court shall not wholly set aside any proceedings or the summons or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

Each party is to bear his own costs.